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In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF JANE JACOBS AS *AMICA CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment permit condemnation of private property for transfer to other private parties solely for the purpose of promoting "economic development"?

2. Does the Public Use Clause allow condemnation of private property for transfer to other private parties for the purpose of promoting economic development without any consideration whatsoever of the economic and social costs imposed by the expropriation of homes, charitable institutions, and businesses?

3. Does the Public Use Clause allow condemnation of private property for transfer to other private parties for the purpose of promoting economic development without any binding assurance that such development will actually take place?

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INTEREST OF THE *AMICA CURIAE*

Jane Jacobs submits this brief as *amica curiae* pursuant to Rule 37.3 of the Rules of the Supreme Court.[1]

The *amica* is a world-renowned scholar in the field of urban policy and economic development. Her 1961 book, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, revolutionized the field of urban studies and showed how the indiscriminate use of coercive large-scale planning and "renewal" programs often harms the very communities that it is ostensibly intended to help. She has written numerous other works on urban policy and economic planning including THE ECONOMY OF CITIES (1969), CITIES AND THE WEALTH OF NATIONS (1984), SYSTEMS OF SURVIVAL (1993), and THE NATURE OF ECONOMIES (2000).

Throughout her career, Ms. Jacobs has emphasized that the use of eminent domain for the ostensible purposes of "urban renewal" and "economic development" usually serves to benefit powerful private interests at the expense of the poor and working class communities it is supposedly intended to help. *See, e.g.*, JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5, 270-90, 311-14 (1961) (hereinafter "JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES") (describing massive harms inflicted on poor neighborhoods by the use of eminent domain in urban renewal programs). Indeed, *amica* believes that the clear-cutting of neighborhoods like Fort Trumbull is antithetical to the development of healthy, vibrant mixed-use communities she espouses.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amica* states that no counsel for a party authored this brief in whole or in part. Counsel for *amica* further states that the costs associated with printing, filing, and serving this brief were paid by David Humphreys and that no other person, other than *amica* and their counsel, made a monetary contribution to the preparation of the brief. All parties have consented to the filing of this brief, and copies of the consents have been fiied with the Clerk.

STATEMENT OF THE CASE

Amica adopts by reference the statement of the case presented by the Petitioners.

SUMMARY OF ARGUMENT

Economic development takings impose enormous economic and social costs on property owners and neighborhoods, sometimes destroying entire communities, as in the case of *Poletown Neighborhood Council v. City of Detroit,* 304 N.W.2d 455 (Mich. 1981), *overruled County of Wayne v. Hathcock,* 684 N.W.2d 765 (Mich. 2004), in which some 4200 people lost their homes and numerous businesses, churches, and other community institutions were destroyed so that General Motors could build a new factory. *See* Ilya Somin, *Michigan Should Alter Property Grab Rules*, DET. NEWS, Jan 8, 2004, at 11 (hereinafter "Somin, *Michigan*").

The costs of development takings are disproportionately inflicted on poor and minority communities, because these groups are disadvantaged in the political process, especially relative to the powerful corporate and private interests that benefit from economic development condemnations.

Far from furthering their supposed goal of promoting economic growth, development condemnations often inflict economic and social harms that far outweigh any possible benefits. Moreover, the use of eminent domain is not necessary to promote legitimate development projects because private developers have a variety of tools available to overcome the "holdout" problems that might otherwise prevent projects from going forward.

Even condemnations justified by the need to eliminate urban "blight" have caused extensive social harm, displacing hundreds of thousands of people. Economic development takings pose an even greater threat because they can be used to justify almost any condemnation that benefits commercial interests. As Jane Jacobs and other scholars have shown, urban renewal and economic development

condemnations are a perversion of "government powers that were intended for things like schools and roads and public things, [that] are used instead for the benefit of private organizations and individuals." Quoted in Bill Steigerwald, *City Views: Urban Studies Legend Jane Jacobs on Gentrification, the New Urbanism, and Her Legacy,* REASON, June 2001.

Condemnations that are justified solely by the prospect of "economic development" pose an especially grave threat to constitutional property rights because [The] 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." *County of Wayne v. Hathcock,* 684 N.W.2d 765, 786 (Mich. 2004). It is always possible to argue that a given property would be used more efficiently by a different owner, thereby generating increased employment and tax revenue. As a result, economic takings serve as a virtual license for exploitation of the eminent domain power on behalf of powerful interest groups such as large corporations and wealthy developers. The potential for abuse is exacerbated by the fact that Connecticut and other states that permit economic development takings do not impose binding obligations on the new private owners to actually produce the economic benefits that supposedly justified the condemnation in the first place. As a result, private interest groups and local governments can use bait and switch tactics to condemn property for economic development purposes and then use it to serve purely private interests.

Only a categorical ban on economic development takings can prevent the Public Use Clause from becoming a nullity that can be circumvented any time local governments seek to benefit a politically connected private business.

ARGUMENT

I. ECONOMIC DEVELOPMENT CONDEMNATIONS INFLICT MASSIVE ECONOMIC AND SOCIAL COSTS THAT ARE MISTAKENLY IGNORED BY STATE COURTS THAT UPHOLD DEVELOPMENT TAKINGS.

The ostensible justification of economic development takings lies in the economic benefits they supposedly create for the public. Yet courts that have upheld such condemnations routinely ignore the fact that they often inflict massive costs on those groups least able to bear them.

A. State court decisions upholding economic development takings ignore their vast economic and social costs.

The large scale condemnation of private homes and businesses for "economic development" creates enormous social and economic costs that state courts upholding economic development takings have chosen to ignore. In *Kelo,* the Connecticut Supreme Court admitted that the plaintiff property owners in the case would suffer serious harm if forced out of their homes and business properties. *See Kelo v. City of New London*, 843 A.2d 500, 511 (Conn.), *pet. cert. granted*, 125 S. Ct. 27 (2004) (noting that two of the plaintiffs' families have "lived in their homes for decades and others had put enormous amounts of time, effort, and money into their property). In addition, some $80 million in taxpayer money had been allocated to the development project of which the condemnations are a part, without any realistic prospect of a return that rises above a tiny fraction of this amount. *Id.* at 596-600 (Zarella, J., dissenting). Yet the court refused to even consider the significance of these massive costs because "the balancing of the benefits and social costs of a particular project is uniquely a legislative function." *Id.* at 541 n.58.

Contrary to the Connecticut court, the political process often cannot be depended on to give due to consideration to the "social costs" of economic development takings

because such condemnations generally benefit the politically powerful, while the costs fall on the poor and politically disadvantaged. *See* §§ I.C.2, II.A-B, *infra.*

Courts in other jurisdictions that permit economic development takings also fail to give any significant weight to social costs. The *Poletown* majority, for example, did not even mention the vast social costs imposed by the condemnation of 1400 homes and a large number of businesses, churches, and schools. Somin, *Michigan.* Those states that continue to permit economic development takings even after *Poletown's* recent demise also give little or no consideration to the harm they cause.[2]

B. Judicial indifference to the social costs of economic development takings eliminates any possible assurance that the condemnations are actually for a public use.

The failure to scrutinize the costs of economic development takings not only leads to severe harm to property owners, but also prevents courts from making any meaningful effort to ensure that economic development takings really do serve a public use, as is required by the Constitution. Even if we assume, arguendo, that economic development really is a public use, failure to scrutinize the costs of these takings enables government to exercise virtually unlimited condemnation power.

The Public Use Clause,[3] if it is to have any meaning, cannot be interpreted to give government unfettered power to condemn private property "for the benefit of

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[2] See cases cited in note 10, all of which set highly deferential standards for evaluating economic development takings that take little or no account of social costs.

[3] The Public Use Clause was made applicable against the states through the incorporation of the Fifth Amendment under the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897); *see also Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5 (1994) (reaffirming incorporation of the Takings Clause under the Fourteenth Amendment).

another private person." *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937).

Federal courts ordinarily accord great deference to legislative determinations of public use. Such determinations are upheld so long as they are "rationally related to a conceivable public purpose" and are not "palpably without a reasonable foundation." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). However, such deference cannot be extended to the point where the judiciary rubberstamps virtually any condemnation that transfer property to a private commercial enterprise. This "Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Id.* (quoting *Thompson*, 300 U.S. at 80). "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character . . . That principle grows out of the essential nature of all free governments." *Madisonville Traction Corp. v. St. Bernard Mining Corp.*, 196 U.S. 239, 251-52 (1905). Although great deference is granted to legislative determinations of public use, "[i]t is well established that . . . the question [of] what is a public use is a judicial one." *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930).

C. The harms inflicted by economic development takings vastly exceed any possible public benefit.

1. Economic development takings inflict enormous social and economic costs.

Economic development condemnations routinely impose enormous social costs that greatly exceed their putative benefits. Large-scale use of condemnation for development purposes began with the "urban renewal" programs of the 1950s and 1960s. Condemnations stimulated by these programs uprooted thousands of people, destroyed numerous communities, and inflicted enormous economic costs, with few offsetting benefits. *See, e.g.*, JACOBS, DEATH AND LIFE OF

GREAT AMERICAN CITIES, 270-90, 311-14 (describing enormous social and economic costs of urban development takings); MARTIN ANDERSON, THE FEDERAL BULLDOZER (1964) (hereinafter ANDERSON, FEDERAL BULLDOZER) (same); HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 362-84 (2d ed. 1982) (documenting loss of community caused by condemnations); SCOTT GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3-5 (1965) (hereinafter GREER, URBAN RENEWAL AND AMERICAN CITIES) (describing various harms caused by urban renewal condemnations). A recent study concludes that the use of eminent domain in "urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods and helped entrench racial segregation in the inner city." Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 47 (2003) (hereinafter Pritchett, *The "Public Menace" of Blight*). By 1963, over 600,000 people had lost their homes as a result of urban renewal takings. ANDERSON, FEDERAL BULLDOZER 8, 54. The vast majority ended up living in worse conditions than they had experienced before their homes were condemned. *Id.* at 57-70.

Many of these abuses occurred as a result of takings justified by the removal of "blight" rather than economic development per se. *See Berman v. Parker*, 348 U.S. 26 (1954) (holding that blight removal is a legitimate public purpose). Yet economic development takings pose the same dangers, and indeed greater ones, since they can be applied to any property, not just that located in "blighted" neighborhoods.

a. Economic development takings have high economic costs.

More recent economic development condemnations have had a similarly deleterious impact. The *Poletown* case dramatically illustrates how the promised economic benefits of condemnations often fail to materialize, and are

outweighed by the massive costs. Not only did the new GM plant create far fewer jobs than promised,[4] but the limited economic benefits that the plant did create were likely overwhelmed by the economic harm it caused to the city.

The "public cost of preparing a site agreeable to . . . General Motors [was] over $200 million." *Poletown,* 304 N.W.2d at 470 (Ryan, J., dissenting). GM paid the city only $8 million to acquire the property. *Id.* In addition to the cost to the city's taxpayers, we must also consider the economic damage inflicted by the destruction of some 600 businesses and 1400 residential properties. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City,* DOLLARS & SENSE, July 2001 (hereinafter "Michael, *Detroit*"). Although we have no statistics on the number of people employed by the businesses destroyed as a result of the *Poletown* condemnation, it is quite possible that more people lost jobs as a result of the decision than gained them. If we assume that the 600 eliminated businesses employed a modest average of slightly more than four workers, their total lost work force turns out to be greater than the 2500 jobs created at the GM plant by 1988. *Id.* And this calculation does not consider the jobs and other economic benefits lost as a result of the destruction of numerous nonprofit institutions such as churches, schools, and hospitals. Overall, even if we consider its impact in purely economic terms, it is likely that the *Poletown* condemnation caused more harm to the people of Detroit than good.

The failure of the *Poletown* takings to produce any clear net economic benefit for the city has significance far beyond that case itself. In *Poletown,* the magnitude of the economic crisis facing Detroit and the detailed public scrutiny given to the city's condemnation decision led the Michigan Supreme Court to conclude that the economic benefit of the taking was particularly "clear and significant." *Poletown,* 304 N.W.2d at 459. The court even went so

[4] See discussion in Section II.D.2, *infra*.

far as to say that "[i]f the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project." *Id.* If the claimed "public benefit" of even so "clear" a case as *Poletown* ultimately turned out to be a mirage, it seems unlikely that courts will do any better in weighing claims of economic benefit in more typical cases where the evidence is less extensive and less closely scrutinized.

In addition to direct economic costs arising from the destruction of homes and businesses and massive expenditure of public resources, economic development takings also impose large indirect costs by destroying diversified uses of property and replacing them with much more homogenous ones. In urban neighborhoods, diversity of land uses within a neighborhood is often essential to promoting sustained economic growth. *See* JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES chs. 8, 15. The employment of development condemnations to replace a wide range of uses with one or a small number of development projects results in "a static society" and "destroys neighborhoods where constructive and improving communities exist and where the situation calls for encouragement rather than destruction." *Id.* at 270-71, 289. In effect, economic development condemnations replace real neighborhoods with counterfeits.

b. Economic development takings inflict massive nonfinancial costs that often go uncompensated.

In addition to their massive economic costs to communities and homeowners, economic development takings also inflict major nonfinancial costs on their victims by destroying communities and forcing residents to relocate to less desired locations. As Jane Jacobs explained in her classic 1961 study:

> [P]eople who get marked with the planners' hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed . . . Whole communities are torn apart and sown to the winds,

> with a reaping of cynicism, resentment and despair that must be seen to be believed.

JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5.

While "fair market value" compensation may compensate homeowners for a part of the financial loss they suffer, it does not even begin to compensate them for the destruction of community ties, disruption of plans, and psychological harms they suffer. *See generally* MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004) (describing extensive social and psychological costs of forced relocation); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN INC: HOW AMERICA REBUILDS CITIES 20-35 (1989) (hereinafter, "FRIEDEN & SAGALYN, DOWNTOWN") (same); *cf.* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82-85 (1986) (hereinafter, "Merrill, *Economics of Public Use*") (showing how the use of eminent domain systematically imposes "uncompensated subjective losses" because most property owners value their holdings at more than their market value). In recent years, scholars from a wide range of ideological perspectives have reinforced Jacobs' conclusion that development condemnations inflict enormous social costs that go beyond their "economic" impact, narrowly defined.[5] The existence of these large uncompensated costs strengthens the case for stringent scrutiny of

[5] See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1689-91 (1988) (making the case for limitations on the eminent domain power because of the connection between "personal property" and individuals' sense of personhood and community); David R.E. Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 ECOLOGY L.Q. 671, 673-74 (1988) (same); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 62 n.60 (1992) (criticizing *Poletown* as a "notorious" decision that "sustained a takeover of a neighborhood by General Motors that ignored huge elements of losses to the private owners who were dispossessed" and arguing for strict judicial constraints on similar condemnations).

economic development takings under the Public Use Clause.

2. Development condemnations disproportionately victimize the poor and minorities.

Economic development condemnations "seriously jeopardize . . . the security of all private property ownership." *Poletown*, 304 N.W.2d at 465 (Ryan, J., dissenting). But poor and minority property owners face especially grave risks.

The properties of poor and politically weak owners are more likely to be targeted for condemnation than those of wealthy and influential ones. The Poletown neighborhood, for example, may have been targeted in part because its people were "largely lower-income and elderly" and many "assumed that these people would not have the resources or the know-how to fight back." JEANNIE WYLIE, POLETOWN: A COMMUNITY BETRAYED 58 (1989). Relatively affluent citizens and major corporations have far greater political influence than the poor do. *See generally* SIDNEY VERBA, ET AL., VOICE AND EQUALITY (1995) (providing extensive evidence of the strong correlation between affluence and political activism and influence). Thus it is not surprising that the poor often chosen for condemnations that benefit wealthy corporations and developers. *See, e.g.*, JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 311-14; Pritchett, *The "Public Menace" of Blight* 45-49. Affluent corporate and developer interests are "repeat players" in the eminent domain system who have the resources and expertise to lobby effectively in support of their objectives. Kochan, *"Public Use" and the Independent Judiciary* 79-83. Poor and lower middle class property owners, by contrast, have little ability or incentive to develop similar lobbying power.

African-American and other minority property owners are also particularly likely to be targeted by economic development condemnations. Between 1949 and 1963, sixty-three percent of all families displaced by urban renewal condemnations were nonwhite. FRIEDEN &

SAGALYN, DOWNTOWN 28; *see also* ANDERSON, FEDERAL BULLDOZER 7-8 (noting that urban renewal takings disproportionately victimized minorities). So many poor African-Americans were dispossessed by urban renewal condemnations in the 1950s and 1960s, that "[i]n cities across the country urban renewal came to be known as 'Negro removal.'" Pritchett, *"Public Menace" of Blight* 48; *see also* GREER, URBAN RENEWAL AND AMERICAN CITIES (documenting dispossession of black homeowners).

In a particularly dramatic example of the racial impact of massive condemnations, the takings approved by this Court in *Berman v. Parker* displaced some "5012 persons, of whom 97.5% were Negro." *Berman,* 348 U.S. at 30. Although the condemnations were ostensibly intended to benefit the area's residents, in fact only 310 of the 5900 new residences constructed after the condemnations were classified as affordable to the displaced residents of the area, and within a few years the neighborhood became majority white. HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 163-64 (1995).

Racial and class bias have continued to infect more recent condemnations as well. As one study finds:

> In essence, the powers and internal pressures [of the condemnation process] create a mandate to gentrify selected areas, resulting in a de facto concentration of poverty elsewhere, preferably outside the decision makers' jurisdiction. Numerous past experiences indicate that the process has been driven by racial animosity as well as by bias against the poor. The net result is that a neighborhood of poor people is replaced by office towers, luxury hotels, or retail centers. The former low-income residents, displaced by the bulldozer or an equally effective increase in rents, must relocate into another area they can – perhaps – afford. The entire process can be viewed as a strategy of poverty concentration and geographical containment to protect the property values – and entertainment choices – of downtown elites.

Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control,* 27 U. MICH. J.L. REFORM 680, 740-41 (1994).

More generally, economic development condemnations tend to target groups that, due to lack of resources, collective action problems, or prejudice against them, have little power in the political process. *See generally* Bruce A. Ackerman, *Beyond Carolene Products,* 98 HARV. L. REV. 713 (1985) (describing factors that lead some groups to be disadvantaged in the political process relative to others). These are precisely the kinds of groups that most need protection from a strong independent judiciary. *Id.*; *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that "special conditions, which tend . . . seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry").

3. Condemnation is not necessary to promote real economic development.

The case against economic development condemnations is further strengthened by the fact that they are not necessary to achieve their ostensible objectives. Large-scale development projects can and do succeed without recourse to the coercive power of eminent domain. As the Michigan Supreme Court pointed out in its recent major decision in *Hathcock,* development projects are not "enterprises whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving. To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe . . . that these constellations required the exercise of eminent domain . . . for their formation." *Hathcock,* 684 N.W.2d at 783-84. If a project is sound enough that its owners can reasonably

expect to make a profit, there is usually no reason why they cannot acquire the necessary land through voluntary transactions.

Despite the existence of numerous successful development projects that did not require the use of eminent domain powers, some continue to argue that the use of eminent domain is necessary to facilitate economic development in situations where large scale projects requires the assembly of a large number of lots previously owned by numerous different individuals. If the coercive mechanisms of eminent domain cannot be employed, the argument goes, a small number of "holdout" owners could either block an important development project or extract an extremely high price for their acquiescence. *See* Merrill, *Economics of Public Use* 72-81 (describing the "holdout" rationale for use of eminent domain).

However, as the existence of numerous successful development projects that did not rely on eminent domain suggests, private developers have a variety of tools for dealing with holdout problems without recourse to government coercion. In many cases, developers can negotiate with individual owners in secret or use specialized agents to assemble the properties they need without alerting potential holdouts to the possibility of making a windfall profit by holding the project hostage. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 43-44 (2d ed. 1977) (describing these methods).

A second mechanism by which developers can prevent holdout problems without recourse to eminent domain is by means of "precommitment" strategies or "most favored nation" contract clauses. The developers can sign contracts with all the owners in an area in which they hope to build, under which they commit themselves to paying the same price to all. By this means, the developer successfully "ties its hands" in a way that precludes it from paying inordinately high prices to the last few holdouts, because it would be legally required to pay the same high price to all the previous sellers. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 35-43, 120-31 (1960) (classic

explanation of the ways in which tying one's own hands can give an advantage in negotiations); *see also* Kochan, "*Public Use and the Independent Judiciary* 88-90 (explaining how precommitment strategies used to prevent holdouts in corporate transactions can be applied to economic development projects that might otherwise need to resort to eminent domain).

Finally, it is essential to realize that even if there is a small subset of desirable economic development projects that can only be undertaken with the assistance of eminent domain power, there is no way of confining the use of economic development condemnations to these circumstances. Once the economic development rationale is allowed to justify takings, it can and will be used by powerful interest groups to facilitate projects that either fail to provide economic benefits that justify their costs or could have been undertaken without resorting to coercion or both. The political power of the beneficiaries of condemnation is likely to be a far more potent determinant of the decision to condemn than any objective economic analysis of holdout problems.[6]

II. ECONOMIC DEVELOPMENT TAKINGS VIOLATE THE PUBLIC USE CLAUSE BY FACILITATING ABUSE OF THE POWER OF EMINENT DOMAIN FOR THE BENEFIT OF POLITICALLY INFLUENTIAL PRIVATE INTERESTS.

A. The Public Use Clause does not allow government unlimited power to condemn property.

This Court has long recognized that the power of eminent domain is a "despotic power" that can easily be abused. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Penn. 1795). As Justice John Marshall Harlan explained in the case that first incorporated the Takings Clause against the states, "[A] government, by whatever

[6] See discussion in §§ I.C.1-2, II.C-D, *infra*.

name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism." *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 237 (1897).

"It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character . . . That principle grows out of the essential nature of all free governments." *Madisonville Traction Corp. v. St. Bernard Mining Corp.*, 196 U.S. 239, 251-52 (1905). Although great deference is granted to legislative determinations of public use, "[i]t is well established that . . . the question [of] what is a public use is a judicial one." *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). Economic development condemnations violate these fundamental principles because they can be used to justify virtually any condemnation of property for transfer to private commercial interests.

B. The economic development rationale can justify almost any taking that benefits a commercial enterprise.

Allowing "economic development" to justify condemnation of private property is a blank check for the abuse of government power on behalf of powerful private interests. As the Supreme Court of Michigan explained in its recent decision to forbid the use of "economic development" as a justification for takings:

> [The] 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use then the ownership of real property is perpetually threatened by the expansion of plans of any large discount retailer, 'megastore,' or the like.

Hathcock, 684 N.W.2d at 786.

In *Hathcock*, the Michigan Supreme Court overruled its notorious 1981 *Poletown* decision – which used the economic development rationale to uphold the condemnation of some 4000 people's homes, so that General Motors could build a new factory. *See* Somin, *Michigan* (describing massive deleterious impact of the *Poletown* condemnations). Dissenting in that case, Justice Fitzgerald warned that "[t]he decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently 'public' to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses." *Poletown*, 304 N.W.2d at 464 (Fitzgerald, J., dissenting).

Unfortunately, the Connecticut Supreme Court in the present case, decided a few months before *Hathcock*, relied heavily on *Poletown* to justify its holding that economic development qualifies as an acceptable public use. *See Kelo*, 843 A.2d at 528 n.39 (describing *Poletown* as a "landmark case . . . [that] warrants further discussion because it illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit"). As in *Poletown*, the *Kelo* condemnations were initially undertaken in large part to serve the interests of a powerful private corporation. According to James Hicks, executive vice president of RKG Associates, the firm that helped New London prepare the development plan that resulted in the condemnations, Pfizer was the "'10,000 pound gorilla' and a 'big driving point' behind the development project." Quoted in *id.* at 537.

Like the Michigan Supreme Court in *Hathcock*, the Supreme Court of Illinois has recently explained the grave danger to constitutional property rights inherent in allowing a mere "contribu[tion] to economic growth in the region" to justify takings. *Southwestern Ill. Dev. Auth. v. National City Env.*, 768 N.E.2d 1, 9 (Ill.), *cert. denied*, 537 U.S. 880 (2002). Such a standard could justify virtually

any taking that benefited a private business because "incidentally, every lawful business does this." *Id.* The Illinois court echoed Justice Fitzgerald's warning that the economic benefit criterion provides virtually a blank check for takings because "[a]ny business enterprise produces benefits to society at large." *Poletown,* 304 N.W. 2d at 464 (Fitzgerald, J., dissenting). "Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." *Id.* at 464.[7]

Numerous cases from other states support the conclusion that condemnation cannot be justified where the only public benefit is the possibility of increased economic growth.[8]

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[7] Similarly, the Supreme Court of Kentucky has pointed out that:

> If public use were construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

Prestonia Area Neighborhood Ass'n v. Abramson, 797 S.W.2d 708, 711 (Ky. 1990).

[8] *See, e.g., Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1175 (E.D. Mo. 2003), *rev'd on other grounds,* 2004 WL 190439 (8th Cir. Feb. 3, 2004) (owner likely to prevail on claim that condemnation of shopping center for transfer to Target so that Target would keep its economic benefits in the city lacked public use); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp.2d 1123, 1129-31 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003) (finding that condemnation to replace one store with another, more lucrative one,

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C. Condemnation decisions are likely to be driven by the demands of politically powerful interest groups rather than by public benefit.

There is no reason to believe that genuine economic benefits will be the true determinant of condemnation decisions, and much reason to conclude that decisions will be driven by the political influence of private interests that

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was not a public use); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *Ga. Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a "substantial . . . projected economic benefit" cannot justify a "condemnation"); *Merrill v. City of Manchester*, 499 A.2d 216, 217-18 (N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) ("We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other shopkeepers"); *City of Little Rock v. Raines*, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); *Hogue v. Port of Seattle*, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential properties so that agency could "devote it to what it considers a higher and better economic use," *id.* at 187); *Opinion of the Justices*, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); *Sweetwater Valley Civic Ass'n v. City of National City*, 555 P.2d 1099, 1103 (Cal. 1976) (holding that eminent domain "never can be used just because the [city] considers that it can make better use or planning of an area than its present use or plan" and that "it is not sufficient to merely show that the area is not being put to its optimum use, or that the land is more valuable for other uses" to justify condemnation of property). *See also Daniels v. Area Plan Comm'n*, 306 F.3d 445, 464-65 (7th Cir. 2002) (replacing residential uses with economically more efficient commercial ones did not bear substantial relation to a public purpose because the condemnation "only benefits the public if [the private party] benefits first, and even then if the commercial development is completed and successful. . . . ").

benefit from them. *See, e.g.*, Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 79-83 (1998) (hereinafter Kochan, *"Public Use" and the Independent Judiciary*) (explaining how powerful private interests can use the condemnation process to their advantage); Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 289-91 (1992) (explaining how the political process advantages private beneficiaries of condemnations over victimized property owners).

Politically powerful private interests such as General Motors in *Poletown* and Pfizer in the present case are much more likely to succeed in persuading politicians of the merits of their condemnation projects than politically weaker groups whose projects might serve the public interest more. *See Kelo*, 843 A.2d at 537 (noting that Pfizer was the "'10,000 pound gorilla' and a 'big driving point' behind" the New London condemnations).

D. The danger of abuse is heightened by the lack of any requirement that the new owners of condemned property actually provide the public benefits that supposedly justified condemnation in the first place.

The danger of abuse of the eminent domain power is greatly exacerbated if neither the government nor the new private owners of the condemned property have any obligation to actually provide the "development" that was used to justify the use of eminent domain.

If there is no such binding requirement, then nothing prevents government officials and private interests from justifying a taking on the basis of economic development and then using the property purely for the benefit of private interests, after the condemnation has obtained judicial sanction. As the Seventh Circuit recently held "[t]he public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if [the new] landowner chooses to

use his property in a beneficial, but not mandated, manner." *Daniels*, 306 F.3d at 466.

1. Connecticut and other states that permit economic development takings do not impose any binding obligation on the new owners to actually produce any economic benefits for the community.

Courts in many jurisdictions have explicitly held that property cannot be condemned without advance assurances that it will be employed only for specified public uses.[9] Unfortunately, states that permit economic development takings depart from this sensible principle by

[9] *See, e.g., Cincinnati v. Vester*, 281 U.S. 439, 447-48 (1930) (holding that "private property could not be taken for some independent and undisclosed public use"); *County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (en banc) (invalidating agreement that lacked controls over the use of the condemned property because "[s]uch controls are designed to assure that use of the property condemned will be in the public interest."); *State ex. rel. Sharp v. 0.62033 Acres of Land*, 110 A.2d 1, 6 (Del. Super. Ct. 1954), *aff'd*, 112 A.2d 857 (Del. 1955) (holding that "[t]he doctrine of reasonable time prohibits the condemnor from *speculating* as to *possible* needs at some *remote* future time") (emphasis in the original); *Alsip Park Dist. v. D & M P'shp*, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993) (holding that "[I]f the facts" in a condemnation proceeding "established that . . . [the condemnor] had no ascertainable public need or plan, current or future for the land, defendants [property owner] should prevail"); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to "private parties subject to conditions to insure that the proposed public use will continue to be served"); *Krauter v. Lower Big Blue Nat. Res. Dist.*, 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action. . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not sufficient."); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. 1998) (holding that when a "public agency acquires . . . property for the purposes of conveying it to a private developer," there must be advance "assurances that the public interest will be protected").

allowing condemnations transferring property to private entities despite the lack of a binding agreement requiring them to actually provide the alleged economic benefits used to justify the condemnation in the first place.

In the present case, "[t]here are no assurances of a public use in the development plan [under which Petitioners' property was condemned]; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized." *Kelo*, 843 A.2d 602 (Zarella, J., dissenting). In this respect, *Kelo* is similar to *Poletown*, where there was no binding obligation on General Motors to provide any of the alleged economic benefits to Detroit that justified the massive condemnation of property in that case. *Poletown*, 304 N.W.2d at 479-80 (Ryan, J., dissenting); *see also City of Detroit v. Vavro*, 442 N.W. 2d 730, 731 (Mich. App. Ct. 1989) (holding that *Poletown* does not require the new private owner of condemned property to "enter . . . into a binding commitment . . . to construct the project" that was used to justify condemnation).

The other states that allow economic development condemnations also fail to require either the government or the new owners to actually provide the alleged public benefits.[10] This aspect of economic development condemnations

[10] *See, e.g., Gen. Bldg. Contractors v. Bd. of Shawnee Cty. Comm'rs*, 66 P.3d 873, 881-83 (Kan. 2003) (upholding economic development condemnation for purpose of building industrial facility for later transfer to private owners with whom no development agreements had as yet been reached); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W. 2d 365, 373-74 (N.D. 1996) (following *Poletown* approach and concluding that economic development takings will be upheld so long as the "primary object" of the taking is "economic welfare"); *City of Minneapolis v. Wurtele*, 291 N.W. 2d 386, 390 (Minn. 1980) (holding, in a case endorsing the constitutionality of economic development takings, that "a public body's decision that a [condemnation] project is in the public interest is presumed correct unless there is a showing of fraud or undue influence"); *Cf. Vitucci v. New York City Sch. Constr. Auth.*, 289 A.D. 2d 479, 480-81 (N.Y. App. Div. 2001) (holding that an economic development taking passes muster despite the fact that the property

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gives corporations and local governments an effective blank check to use bait and switch tactics to justify condemnation on the basis of the supposed public use of economic development and then utilize the property for their own private purposes.

2. Private interests exploit the lack of binding obligations to acquire property on the basis of inflated estimates of economic benefits that they then fail to deliver on.

In the absence of any binding obligations to actually deliver on the promised economic benefits, nothing prevents municipalities and private interests from using inflated estimates of economic benefit to justify condemnation and then failing to provide any such benefits once courts approve the taking and the property is transferred to its new owners.

The notorious *Poletown* decision illustrates the dangers of allowing courts to accept dubious estimates of economic benefit at face value. In that case, the City of Detroit and General Motors claimed that the construction of a new plant on the expropriated property would create

was originally condemned to build a school, because "as long as the initial taking was in good faith, there appears to be little limitation on the condemnor's right to put the property to an alternate use upon the discontinuation of the original planned public purpose"). The Maryland Court of Appeals decision endorsing economic development condemnations was partly based on the fact that the government "will maintain significant control over the industrial park" that the new owner used the condemned property to build. *Prince George's County v. Collington Crossroads*, 339 A.2d 278, 283 (Md. 1975). However, the control in question involved merely the right to regulate the facility to ensure "health, safety, and welfare, control . . . hazards and nuisances, and guidelines for assuring a high quality physical environment; and a guarantee that part of the project would be used as "open space." *Id.* It did not create a binding obligation to produce any actual economic benefits for the community of the kind that were used to justify condemnation in the first place.

some 6150 jobs. *Poletown,* 304 N.W.2d at 466-67 (Ryan, J., dissenting). The estimate of "at least 6000 jobs" was put forward by both Detroit Mayor Coleman Young and Thomas Murphy, Chairman of the Board of General Motors. *Id.* at 467-68 (citing statement of Mayor Young and reprinting letter from Thomas A. Murphy, Chairman of the Board, General Motors, to Coleman A. Young, (October 8, 1980)).

Yet, as Justice Ryan warned in his dissent, "there are no guarantees from General Motors about employment levels at the new assembly plant . . . [O]nce [the condemned property] is sold to General Motors, there will be no public control whatsoever over the management, operation, or conduct of the plant to be built there." *Id.* at 480. He pointed out that "General Motors will be accountable not to the public, but to its stockholders," and would therefore make decisions as to the use of the property based solely on stockholder interests rather than the economic interests of the general public that the condemnation was intended to further. *Id.*

Justice Ryan's warning was prescient. The GM plant opened two years late, and, as of 1988 – seven years after the *Poletown* condemnations – it employed "no more than 2500 workers." Michael, *Detroit.* Even in 1998, at the height of the 1990s economic boom, the plant "still employed only 3600" workers, less than 60% of the promised 6150. *Id.*

Ironically, the court below in the present case praised *Poletown's* deference to legislative and administrative determinations of public benefit, and indeed concluded that condemning authorities deserve even *greater* deference to their judgment than that granted in *Poletown*! *See Kelo,* 843 A.2d 528 n.39. As *Poletown* itself dramatically demonstrated, such blind deference is sadly misplaced.

Both corporate interests and political leaders dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation. Courts are in a poor position to second-guess plausible-looking financial and job estimates provided by

officials. Even if the governments and corporations involved do not engage in deliberate deception, there is a natural tendency to overestimate the public benefits and likelihood of success of projects that advance one's own private interests. See STEVEN H. PINKER, HOW THE MIND WORKS 421-23 (1999) (explaining how evolutionary selection pressures lead to the development of a strong tendency to believe that what is in our own self-interest is also beneficial for society). Whether corporate and government leaders deliberately lie or honestly believe that "what is good for General Motors is good for America," the outcome is likely to be the same.

III. THIS COURT SHOULD CATEGORICALLY FORBID THE USE OF "ECONOMIC DEVELOPMENT" AS A JUSTIFICATION FOR CONDEMNATION UNDER THE PUBLIC USE CLAUSE.

A. A categorical ban on economic development condemnations is necessary to ensure that the power of eminent domain is not routinely abused for the benefit of private interests.

Economic development takings are vulnerable to abuse that is virtually impossible to prevent because the development rationale can be used to justify almost any condemnation that benefits a private business. *See* Part II *infra.* Furthermore, their economic and social harms that vastly outweigh any possible benefits, and are rarely if ever necessary to promote legitimate development projects. *See* Part I *infra.* For these reasons, the best approach for the Court to take would be to forbid the use of economic development as an independent rationale for the use of eminent domain in cases where private property is condemned for transfer to other private parties. Alternatively, it should at the very least hold that courts permitting economic development takings should take into account the economic and social costs of condemnation and require the new owners to accept a binding obligation to actually produce the economic benefits that allegedly justify condemnation in the first place.

Obviously, a ban on economic development takings would not prevent condemnations undertaken for legitimate public purposes that have an incidental effect of promoting economic development. It also would fall far short of banning all condemnations that transfer property to private parties. It would, however, eliminate a rationale for condemnation that if permitted would virtually gut the Public Use Clause as a meaningful restriction on the condemnation power.

B. A categorical ban on economic development takings is consistent with this Court's decisions in *Hawaii Housing Authority v. Midkiff* and *Berman v. Parker*.

The result urged by *Amica* is perfectly compatible with this Court's decisions in *Midkiff* and *Berman*. In both cases, there were special circumstances that justified the use of condemnation in those situations, but would not justify using the power to condemn property solely for purposes of economic development.

1. The *Midkiff* decision does not sanction an unlimited condemnation power of the sort that would result from permitting economic development takings.

The *Midkiff* decision grants great deference to legislative judgments of public use. Such determinations are upheld so long as they are "rationally related to a conceivable public purpose" and are not "palpably without a reasonable foundation." *Midkiff*, 467 U.S. at 241. However, deference cannot be extended to the point where the judiciary rubberstamps virtually any condemnation that transfer property to a private commercial enterprise. As the *Midkiff* opinion emphasizes, this "Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Id.* (quoting *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937)). Therefore, *Midkiff* deference cannot justify a public use

rationale that would result in the establishment of a virtually unlimited power to condemn property for the benefit of private businesses. *See* Part II *infra*.

Furthermore, *Midkiff's* deferential approach should not be unthinkingly applied to cases arising in vastly different contexts. *Midkiff* arose in an unusual situation in which a mere seventy-two private landowners had control over some forty-seven of the state's land, including ninety-two percent of the private owned land. *Id.* at 232.[11] The Hawaii legislature had determined that the use of eminent domain was the only way "to reduce the perceived social and economic evils of [this] land oligopoly." *Id.* at 241-42. It emphasized that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242.

By contrast, economic development takings are a comparatively more recent innovation, and one that is much more easily abused "for the benefit of another private person" than is the regulation of monopolies. *Id.* at 241. The Seventh and Ninth Circuits have both held that full *Midkiff* deference does not apply in contexts where there is an unusually great risk of abuse of the eminent domain power. *See Daniels*, 306 F.3d at 465-66 (striking down condemnation where the public purpose used to justify it was "a speculative future benefit that could accrue only if a landowner chooses to use his property in a beneficial but not mandated manner"); *Armendariz v. Penman*, 75 F.3d 1311, 1321-22 (9th Cir. 1996) (en banc) (holding that deference is inappropriate in a case where a taking resulted from "a raw misuse of government power"). As the Ninth Circuit points out, "[i]f officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those

[11] The seventy-two property owners controlled 47% of the state's landed, while federal and state governments owned some 49%. *Id.* Thus, we can calculate that the seventy-two big landowners controlled ninety-two percent of the privately owned land.

officials could later justify their decisions in court merely by positing a 'conceivable public purpose' to which the taking is rationally related, the 'public use provision' of the Takings Clause would lose all power to restrain government takings." *Armendariz*, 75 F.3d at 1321. Similarly, the Public Use Clause would likewise "lose all power to restrain government takings" if this Court sanctions a rationale for condemnation that would license virtually any taking that benefits a private business.

2. *Berman v. Parker* does not sanction condemnation of private property in unblighted areas purely for purposes of facilitating development.

In *Berman v. Parker*, this Court held that condemnations adopted for the purpose of eliminating "slums" do not violate the Public Use Clause. *Berman*, 348 U.S. at 32-35. Although the Court held that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive," it also made clear that such deference to condemning authorities is only appropriate when the state adheres to "specific constitutional limitations." *Id.* at 32. Thus, the *Berman* Court emphatically did not sanction an unlimited power to designate property as blighted and then condemn it for the purpose of transferring it to private interests.

The area designated for redevelopment and the use of the eminent domain power in *Berman* was characterized by "[m]iserable and disreputable housing conditions." *Id.* Surveys demonstrated that "64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating." *Id.* at 30. Such conditions are a far cry from the use of eminent domain in order to promote potential development in nonblighted areas.

Although the *Berman* Court, in dicta, noted that the legislature may seek to make the "community . . . beautiful

as well as healthy, spacious as well as clean," it did not hold that purely esthetic or economic gains are by themselves sufficient to justify the use of condemnation for the alleged purpose of alleviating blight. *Berman*, 348 U.S. at 33. Instead, it limited itself to considering the use of eminent domain to revitalize areas that are characterized by persistent "slum" conditions, "as though possessed of a congenital disease." *Id.* at 34; *see also Opinion of the Justices*, 126 N.E.2d 795, 803 (Mass. 1955) (holding that *Berman* applies only to "slum" areas, and that where "[t]he project is not a slum clearance one, . . . the principle on which rest such cases as . . . *Berman v. Parker*, 348 U.S. 26, is not applicable"); *cf. Hogue v. Port of Seattle*, 341 P.2d 171, 184-87 (Wash. 1959) (en banc) (citing *Opinion of the Justices* to invalidate a taking where the area in question was not a "slum or blighted area").

C. If this Court chooses not to ban economic development condemnations, it should at least require courts to consider the social costs of condemnation and compel the new owners of expropriated property to accept a binding obligation to produce the economic benefits that justify condemnation in the first place.

If this Court chooses to hold that economic development is a legitimate public use, it should not give condemning authorities untrammeled power to condemn whatever properties they might want to transfer to powerful private interests. Instead, the Court should impose two restrictions in the interest of ensuring that economic development takings really do promote the supposed public use of economic advancement rather than merely serve private interests.

First, the Court should require lower courts weigh the social and economic costs of economic development condemnations and disallow condemnations that have costs that exceed their benefits. Otherwise, we are likely to see more *Poletown*-style condemnations that inflict vastly

greater costs on the community than they do benefits, thus actually undermining economic development rather than promoting it. *See* § I.C.1.a *infra*. The political process cannot always be trusted to balance costs and benefits objectively because many economic development takings are designed to benefit the politically powerful at the expense of the weak; obviously, political leaders have strong incentives to favor the former at the expense of the latter even if by so doing they undermine longterm development. *See* § I.C.2.

Second, it is essential that the new private owners of condemned property be legally required to actually provide the economic benefits to the community that allegedly justified the condemnation. Otherwise, even if courts do weigh costs and benefits, private interest groups and their political allies can force through harmful takings simply by providing inflated estimates of their likely benefits. *See* § II.D.2.

Even if these two requirements are imposed, the resulting system will still permit many abusive condemnations. Courts will often find it difficult to assess plausible-sounding claims of economic benefit, and it will often be impossible to accurately measure the nonfinancial burden that condemnation imposes on those whose property is expropriated. Moreover, even if a project's measurable benefits do outweigh its costs, that conclusion does not eliminate the possibility that development would have advanced still more if a neighborhood were left undisturbed or if local governments sought to promote development through noncoercive means.

Nonetheless, closer judicial scrutiny of economic development takings would be a step forward from a system where government has virtually unlimited power to use "economic development" as an all-purpose justification to condemn the property of the weak for the benefit of the strong.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and enter judgment in favor of the Petitioners.

Respectfully submitted,

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